

VIRGINIA CODE COMMISSION

Thursday, December 3, 2009 – 10 a.m.

General Assembly Building, 6th Floor

Speaker's Conference Room

Richmond, Virginia 23219

MEMBERS PRESENT: R. Steven Landes, Chairman; John S. Edwards, Ryan McDougale; Jane M. Roush; James F. Almand; Robert L. Calhoun; Thomas M. Moncure, Jr.; William R. Janis, Frank S. Ferguson; E.M. Miller, Jr.

MEMBERS ABSENT: None

OTHERS PRESENT: Brian Kennedy, LexisNexis; Chris R. Nolen, Williams Mullen

STAFF PRESENT: Frank Munyan, Elizabeth Palen, Mindy Tanner, Amigo Wade, Jane Chaffin

CALL TO ORDER

Delegate Landes called the meeting to order at 10:10 a.m.

APPROVAL OF MINUTES

Mr. Ferguson noted that Mr. Moncure was listed in the October meeting minutes as both present and absent. Staff will correct the minutes to reflect that Mr. Moncure was present at the October meeting. Judge Roush made a motion to approve the minutes with the noted correction. Mr. Ferguson seconded the motion, and the motion was approved.

RECOMMENDATIONS FROM OCTOBER 1 MEETING

The Chairman advised that a number of recommendations made at the October 1 meeting must be revisited and formally approved because of the lack of a quorum at the October meeting. Jane Chaffin briefed the members on the issues, which are fully explained in the October 1 meeting minutes, and the Commission took the following action.

1. July 30 meeting minutes. Judge Almand made a motion, seconded by Mr. Ferguson to approve the minutes of the July 30, 2009, Code Commission meeting. The motion was approved.
2. Request from the Department of Transportation to correct an error in § 33.1-23.02. Judge Almand made a motion, seconded by Mr. Ferguson, to approve the recommendations made by Commission members at the October meeting to add a comma and internal numbering in § 33.1-23.02 A for clarification. The motion was approved.
3. 2010 Code of Virginia pricing and replacement volumes. Members at the October meeting suggested replacing Volumes 1B, contingent on the passage of the Title 6.1 recodification legislation, 3B and 7. Mr. Miller stated that he would also like to replace the compacts volume, indicating that the pocket parts are cheaper with each additional volume that is replaced. He further explained that the compacts volume is not a popular volume and can be returned to LexisNexis, therefore, replacing the compacts volume provides an opportunity for the purchase of cheaper pocket parts and for a refund from the return of the compacts volume. Mr. Miller made a motion to replace Volumes 1B (Alcoholic Beverages to Boundaries), contingent on the passage of the Title 6.1 recodification legislation; 3B (Courts); and 7 (Motor Vehicles) and to approve the pricing proposal as follows:

	2010 Proposal with Four Replacement Volumes	
	State	Private
Cumulative Supplements	\$162.50	\$239.00
Index	\$ 68.00	\$ 73.00
Replacement Volumes 1B, 3B, 7, Compacts	\$111.00 (\$37 each)	\$ 139.50 (\$46.50 each)
Volume 11	\$ 28.00	\$ 37.00
Volume 11 Supplement	\$ 9.00	\$ 9.00
Advanced Code Service		\$ 53.00
TOTAL	\$415.50	\$574.00

1 Senator Calhoun seconded the motion. Judge Almand indicated his preference to replace
2 only three volumes. The motion was approved, with Judge Almand voting against the
3 motion.

- 4 4. The clarification to Title 6.1 recodification will be addressed by Frank Munyan during the
5 discussion of the Title 6.1 recodification final report.
- 6 5. The obsolete laws report will be addressed by Mindy Tanner during the discussion of the
7 obsolete laws report follow-up.

8 **ADMINISTRATIVE LAW ADVISORY COMMITTEE**

9 Chris Nolen, Chair of the Administrative Law Advisory Committee (ALAC), updated the
10 Commission on ALAC's activities during the last year.

11 The Hearing Officer Handbook Update Subcommittee, one of two ALAC subcommittees,
12 reviewed the Hearing Officer Handbook that is used by the Supreme Court of Virginia at the
13 Supreme Court's suggestion. ALAC approved the subcommittee's changes and has forwarded
14 its recommendations to the Supreme Court.

15 The Incorporation by Reference and Administrative Process Act Exemptions Subcommittee will
16 continue to examine issues related to incorporation by reference, including the burden identified
17 by agencies of following the full regulatory process to update standards that are incorporated by
18 reference in their regulations. Also with regard to incorporating material by reference, Delegate
19 Janis expressed his concern with the legislature mandating in statute that agencies use a
20 specific national standard, thereby circumventing the public participation process. Mr. Nolen
21 advised that these issues would continue to be discussed and reviewed by ALAC.

22 In addition, this subcommittee continues to examine issues related to exemptions to the
23 Administrative Process Act. The Joint Legislative Audit and Review Commission completed a
24 study on Administrative Process Act exemptions in September and, in response to the study,
25 ALAC recommends that the Code Commission consider introducing legislation to repeal three
26 exemptions as follows:

- 27 1. Subdivision A 16 of § 2.2-4002, relating to the Virginia Medicaid Prior Authorization Advisory
28 Committee. This committee no longer exists.
- 29 2. Subdivision A 24, relating to a nonstock corporation created by the Commissioner of the
30 Department of Agriculture and Consumer Affairs. The nonstock corporation is not authorized
31 to promulgate regulations.
- 32 3. Subdivision A 5 of § 2.2-4006, relating to the preliminary program permit fees of the
33 Department of Environmental Quality. The exemption is no longer necessary now that
34 permanent fees have been established by the Department.

1 Judge Almand made a motion, seconded by Senator Calhoun, to go forward with introducing
2 legislation to remove the obsolete exemptions from the Administrative Process Act. the motion
3 was approved.

4 At the conclusion of Mr. Nolen's report, he presented a proposed slate of ALAC appointment
5 recommendations to the Commission for consideration. The slate consists of mostly
6 reappointments with the exception of Karen Perrine who was suggested by Jane Chaffin to take
7 her place on ALAC. Mrs. Perrine works as a regulations analyst in the Office of the Registrar of
8 Regulations, Division of Legislative Services.

9 Mr. Ferguson made a motion to appoint the recommended slate, except that Mike Quinan and
10 Martin Kent's appointments become ex officio positions. Mike Quinan serves in his capacity as
11 Chair of the Virginia Bar Association's Administrative Law Section and Martin Kent serves as a
12 designee of the Attorney General. Delegate Janis seconded the motion, and the motion was
13 approved.

14 **TITLE 6.1 RECODIFICATION FINAL REPORT**

15 Frank Munyan presented the final report of the recodification of Title 6.1. The report is posted on
16 the Code Commission's website and interested parties have been alerted by email notification.

17 Mr. Munyan reviewed an issue raised by the State Corporation Commission that was discussed
18 at the October meeting. The amendment to subsection C of § 3.1-378.7 clarifies that a licensee
19 is not required to take any action in order to establish that it holds the permissible investments in
20 trust in the event of a licensee's bankruptcy or receivership. The change is consistent with the
21 provision of the Uniform Money Service Act upon which the 2009 legislation that added this
22 section was based. The amendment is not intended to be substantive change, and is similar to
23 provisions in laws of Georgia, Illinois, and North Carolina that have clarified the wording of the
24 provision of the Uniform Money Service Act by stating that "permissible investments shall be
25 deemed by operation of law to be held in trust" in such instances. Mr. Ferguson made a motion,
26 seconded by Senator Calhoun, to incorporate the amendment in the recodification. The motion
27 was approved.

28 Mr. Munyan addressed several unresolved issues that are not new substantive issues, but were
29 mentioned in the minutes of the July meeting:

- 30 1. Proposed § 6.2-432 (credit card account disclosures) tracks existing language in §§ 6.1-
31 330.63 B and 6.1-330.78 C. At a previous meeting, the Commission discussed whether the
32 entire section should be deleted as obsolete because subdivision 2 states that a disclosure
33 that complies with the Federal Reserve Board Regulation Z is satisfactory. The State
34 Corporation Commission has concerns with deleting the section and has proposed retaining
35 a portion of § 6.2-432 to read, "Any application form or preapproved written solicitation for
36 an open-end credit card account to be used for personal, family, or household purposes that
37 is mailed to a consumer residing in the Commonwealth by or on behalf of a creditor, whether
38 or not the creditor is located in the Commonwealth, other than an application form or
39 solicitation included in a magazine, newspaper, or other publication distributed by someone
40 other than the creditor, shall contain or be accompanied by a disclosure that satisfies the
41 initial disclosure requirements of the Federal Reserve Board Regulation Z." Mr. Munyan
42 stated that the Attorney General's office has no objection to the proposed language. Senator
43 Calhoun made a motion to approve the language as proposed. Mr. Moncure seconded the
44 motion, and the motion was approved.
- 45 2. At a previous meeting, discussion of the inclusion of an enactment clause stating that the
46 repeal of Title 6.1 shall not affect the validity, enforceability or legality of any loan agreement
47 or other contract that existed prior to the date of the effective date of the new Title 6.2

1 stemmed from a question about the status of outstanding loans under the State Education
2 Assistance Authority, which was repealed in 1998. Staff conducted further research,
3 including discussion with the Department of the Treasury, and proposed enactment clause
4 10, which reads, "That the repeal of Title 6.1 of the Code of Virginia, effective as of October
5 1, 2010, shall not affect the validity, enforceability, or legality or any loan agreement or other
6 contract, or any right established or accrued under such loan agreement or contract, that
7 existed prior to such repeal. The consensus of the Commission is to include enactment
8 clause 10 as proposed by staff in the recodification legislation.

9 3. Previously, the Commission agreed to a substantive change that provides that derogatory
10 statements about the financial condition or affects the solvency or financial standing of
11 banks and trust institutions are actionable if false (§ 6.1-119). The parallel provisions for
12 savings institutions were not similarly amended (§ 6.1-194.94) and, with respect to credit
13 unions, the law already requires that the statement be "untrue in facts" (§6.1-225.64).
14 Delegate Janis believes there is substantive disparity in the law and that the Commission
15 should not address the issue in the recodification. Upon further consideration, the
16 Commission reversed its decision. Mr. Ferguson made a motion, seconded by Delegate
17 Janis, to remove the related previously approved changes to the bank and trust institutions
18 provisions in §§ 6.2-940 and 6.2-1042 (i.e., remove the word "false" before "statement").
19 The motion was approved.

20 4. Mr. Munyan reminded members that a bill was approved for introduction at the September
21 2008 meeting to broaden the definition of "principal" with regard to the Mortgage Lender and
22 Broker Act.

23 5. Reference to compliance with repealed chapters in Title 50. Existing § 6.1-330.78 refers to a
24 partnership which is or was required to file a certificate under Chapters 2, 2.1 or 3 of Title
25 50. Since Chapters 2 and 3 have been repealed, staff proposes the following revised
26 language: "...partnership that is required to file a certificate pursuant to Chapter 2.1 or was
27 required to file a certificate pursuant to former Chapters 2 or 3 of Title 50.

28 6. Staff described several reference inconsistencies between proposed Title 6.2 and provisions
29 in other titles of the Code. Mr. Munyan's suggestions for resolving the inconsistencies were
30 accepted by the Commission with one exception. In subdivision A 2 of § 59.1-207.19
31 (Virginia Lease-Purchase Agreement Act), amend the language to read "a ~~consumer~~
32 transaction as ~~discussed~~ described in § ~~6.1-330.77~~ 6.2-311."

33 Upon completion of Mr. Munyan's presentation, Senator Edwards moved the adoption of the
34 final report. Senator McDougale seconded the motion, and the motion was approved. Senator.
35 McDougale offered to carry the legislation.

36 FOLLOW-UP TO OBSOLETE LAWS REPORT

37 Mindy Tanner presented a follow-up to the obsolete laws report presented at the last meeting.
38 The October minutes fully explain each recommendation.

39 Ms. Tanner reported that she received a response from the Commonwealth's Attorneys'
40 Services Council regarding the repeal of § 3.2-5141, relating to the general duties of attorneys
41 of the Commonwealth when a violation of the food code is reported by the Commissioner of
42 Agriculture and Consumer Services (VDACS). VDACS uses the language when referring cases
43 to attorneys for the commonwealth (ranges from 0-10 cases per year). The Commonwealth's
44 Attorneys' Services Council Board says the section is obsolete. The Commission does not want
45 to remove VDACS prosecution provisions, but noted that the referenced \$10 fee is archaic. The
46 Commission decided to refer the matter back to Boyd-Graves to consider for inclusion in its
47 omnibus bill to raise outdated fees.

1 The provisions relating to gaming contracts (§§ 11-15 and 11-16) were not recommended for
2 repeal.

3 The remaining recommendations outlined in the minutes of the October meeting were
4 addressed as follows:

5 1. Mr. Miller made a motion, seconded by Senator Calhoun, to accept the recommendation to
6 repeal § 55-248.1, which declares federal rent control as unnecessary and directs the Clerk
7 of the House of Delegates to so notify the Housing Expediter. The motion was approved,
8 with Senator McDougle voting against the motion.

9 2. Mr. Ferguson made a motion to accept the recommendations to repeal certain obsolete and
10 unnecessary language in Title 54.1 in block. Senator McDougle seconded the motion, and
11 the motion was approved.

12 **PROPOSED AMENDMENT TO AUTHORIZE ELECTRONIC CERTIFICATION OF**
13 **REGULATIONS**

14 Amigo Wade presented suggested legislation to amend the Virginia Register Act to allow
15 electronic certification of final regulations filed with the Registrar of Regulations. Currently when
16 final regulations are filed with the Registrar, agencies must submit an original, hardcopy
17 certification that the regulations are full, true, and correctly dated. The proposed amendment
18 maintains the requirement for agencies to submit a certification that regulations are full, true and
19 correctly dated, but allows agencies the option of submitting the certification in either original or
20 electronic form. Mr. Ferguson made a motion, seconded by Judge Almand, to approve the
21 proposed amendment. The motion was approved.

22 **CODE COMMISSION MEMBERSHIP CHANGE PROPOSAL**

23 Mr. Miller presented a proposal to expand the Code Commission membership by two optional
24 appointed members. He stated that it is often difficult to maintain a quorum, and believes that
25 this proposal could assist with that issue. It would also provide the ability to retain members
26 whose expertise is valuable to the Commission in the event of retirement. The proposal
27 continues to mandate a membership of 10, but on vote of the Commission, the membership can
28 be expanded to 12. Delegate Landes stated that he does not have a problem with the concept
29 of the bill, but would like the language to be less specific, and instead of naming positions,
30 appoint those with experience and expertise that would bring value to the Commission's work.
31 Mr. Miller offered to rewrite the bill and bring the language back to the Commission for
32 consideration before it adjourns.

33 **LEXISNEXIS PROPOSED CHANGES TO APPEARANCE OF CODE OF VIRGINIA**

34 Brian Kennedy with LexisNexis distributed a summary of proposed changes that LexisNexis is
35 proposing go the appearance of the Code of Virginia. The proposal stems from LexisNexis
36 working to identify areas of improvement to its print products.

37 The current contract provides for LexisNexis to use the same format as was used in 2008, so
38 any changes are discretionary to the Commission. Changes include a reduction of point size in
39 hierarchy headings and analyses to make up for other changes that will use up additional
40 space.

41 The proposed LexisNexis print output style would alter the current Virginia Code as follows:

	Current	Proposed
Type Page Size	30 x 51 picas	30 x 50 picas
Hierarchy Headings (Title, Subtitle, Part, etc.)	10-point regular, initial caps and lower case.	12-point bold, regular, upper case.
Hierarchy Analyses	Hierarchy analyses contain all subunits	Hierarchy only contains its immediate subunits, unless the sub-subunit is the section level, in which case it will also be included
Chapter Analyses Under Title Headings	10-point font	8-point font
Section Headings	Run into statute text	Set out on a separate line
Analyses	Double column	All analyses will be wide measure
Analyses Headings	Chap.; Sec.	Chapter; Section
Note Headings	Run into note text	Set out on a separate line
History Citation	Set out at the end of the last line of the section	Set out in a separate note

The consensus of the Commission is that the 8-point font is too small. Mr. Miller stated that he would like to explore the proposal further. He expressed concern with how the changes might impact bill drafting and the size of the Code. The Commission, however, is agreeable to making changes to improve the Code. Mr. Ferguson suggested convening a special meeting in January to finalize so that LexisNexis can proceed with changes with the 2010 supplements and replacement volumes.

Mr. Kennedy will work with Mr. Miller and Ms. Chaffin to come up with a proposal to submit to the Commission for consideration at a special meeting to be held in January.

At Mr. Miller's request, the Chairman to deferred agenda item 9, relating to the Commission's authority to make corrections to the Code of Virginia.

REVIEW OF CODE COMMISSION POLICIES

Ms. Chaffin presented a compilation of Code Commission policies and practices that have been adopted over the years. The table breaks the policies down into Code of Virginia codification, publication, and distribution policies; drafting policies and practices for bills and title revisions; and miscellaneous provisions.

OTHER BUSINESS; PUBLIC COMMENT; ADJOURN

The Chairman returned to agenda item 8, relating to legislation expanding the membership of the Code Commission. Mr. Miller explained that the latest draft of the legislation would expand the Code Commission membership by no more than two additional, optional nonlegislative members who have demonstrated legal knowledge and experience in the codification of session laws and recodification of statutes. Such optional members would be recommended by the Code Commission and appointed by the Speaker of the House or Senate Rules Committee. Senator McDougle made a motion, seconded by Judge Almand, to go forward with introducing the legislation. The motion was approved with Mr. Miller and Mr. Ferguson abstaining.

There was no further business to come before the Commission. No one from the public came forward during the period set aside for public comment. Mr. Moncure made a motion, seconded by Senator Calhoun, to adjourn the meeting. The motion was approved and the meeting adjourned at 2:30 p.m.